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No. 94-921

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In the Supreme Court of the United States

OCTOBER TERM, 1994

TRI-STATE STEEL CONSTRUCTION COMPANY, INC., ET AL.,
PETITIONERS

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a warrantless inspection by the Occupational Safety and Health Administration (OSHA) of a portion of an open construction site, and a subsequent inspection by OSHA of the remainder of the construction site pursuant to an administrative warrant, violated the Fourth Amendment rights of two subcontractors working on the project.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 26 F.3d 173. The decision of the Occupational Safety and Health Review Commission (Pet. App. 18a-73a) is reported at 16 O.S.H. Cas. (BNA) 1845. The decision of the administrative law judge (Pet. App. 74a-110a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14a-15a) was entered on June 17, 1994. A petition for rehearing was denied on August 22, 1994. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on

November 21, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, National Engineering & Contracting Company, Inc. (National), and its wholly owned subsidiary, Tri-State Steel Construction Co., Inc. (Tri-State), were subcontractors on a reconstruction project involving the restoration of 36 bridges in Cincinnati, Ohio. Pet. App. 2a-3a, 76a. The prime contract on the project was between the Ohio Department of Transportation (the State) and John R. Jurgensen Co. (the general contractor). *Id.* at 20a, 76a. Because the project involved work on sections of interstate highway elevated over city streets in downtown Cincinnati, the State developed a traffic control plan to assure the safety of both the project workers and the public. *Id.* at 3a, 20a-21a.

In accordance with the traffic control plan, the general contractor positioned barrels at 50-foot intervals in a V-like formation to reroute traffic to the two outer lanes on certain four lane bridges, so that petitioners' employees could work in the two center lanes. Pet. App. 3a-4a, 21a-22a. Barrels and traffic control devices were also set up on the roadways leading to those bridges to force motorists to go either to the left or to the right of the blocked-off work areas. *Id.* at 22a. However, when motorists found themselves diverted in directions they did not want to go, some began to cut in between the barrels and across the work area to reenter the traffic flow on the opposite outer lane. *Id.* at 4a, 22a. Although petitioners requested police protection and took some steps over the next few days to protect the workers, those measures proved ineffective. *Id.* at 4a, 23a. Consequently, a representative of the worksite employees

filed a complaint with the local Occupational Safety and Health Administration (OSHA) area office, under Section 8(f)(1) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 657(f)(1), reporting to OSHA the traffic dangers to which the employees were exposed. Pet. App. 4a, 24a & n.6, 76a.

Because OSHA believed that the complaint alleged an imminent danger to the workers, see 29 U.S.C. 662(a), as well as violations of the OSH Act, it promptly dispatched a compliance officer and a trainee to the worksite. Pet. App. 4a, 24a & n.8. Immediately after his arrival at the site, the officer began taking measurements, videotaping the traffic flow—including vehicles traversing the worksite in close proximity to employees—and taking statements from employees. *Id.* at 4a-5a, 24a-25a, 27a n.9. Within an hour, petitioners' attorney arrived and demanded that the OSHA compliance officer cease the inspection and obtain a search warrant. *Id.* at 4a, 26a. The officer refused, noting that he was on public property, and he remained on site for the rest of the afternoon. *Id.* at 4a, 26a-27a, 77a. When the compliance officer returned the next day, he determined that, despite the presence of a policeman, employees remained exposed to traffic hazards. *Id.* at 5a, 27a. Three days later, the general contractor placed barrels at ten-foot intervals and strung meshing between them. *Id.* at 5a, 28a. That measure abated the vehicular hazards. *Ibid.*

During the initial phase of the inspection, however, the compliance officer had observed what he judged to be improperly stored and used flammable gases and improperly used welding rods. Pet. App. 5a, 40a. In accordance with the guidelines set forth in OSHA's general administrative enforcement plan, and with the consent of the state and federal agencies that were funding the project, OSHA applied for and received a

warrant from a federal magistrate to inspect the entire project. *Id.* at 5a, 38a-43a. Under the authority of that warrant, OSHA conducted a comprehensive inspection, after which it issued citations to petitioners alleging additional violations of OSH Act safety and health standards. *Id.* at 5a.

2. After a hearing, the administrative law judge (ALJ) rejected petitioners' Fourth Amendment challenge to OSHA's initial warrantless inspection, on the ground that the conditions on the highway worksite were "in plain view of all who drove through the area," and, therefore, "there was no 'expectation of privacy' in the highway activity being observed." Pet. App. 77a-78a. The ALJ found OSHA's expanded, warrant-authorized inspection justified both by the plain view observations of the compliance officer and by the terms of OSHA's general inspection plan, which set forth generally applicable, neutral criteria by which to determine the need for a broadened work-area inspection. *Id.* at 78a-79a. The ALJ then vacated on the merits the citations relating to several of the alleged violations, affirmed the rest, and assessed Tri-State and National $1150 and $2050, respectively, in civil penalties. *Id.* at 107a-110a.

3. The Occupational Safety and Health Review Commission (Commission) affirmed the ALJ's ruling respecting the validity of the inspections under the Fourth Amendment, but on grounds different than those cited by the ALJ. The Commission held that the initial inspection was not justified under a "public right-of-way" theory, because petitioners had attempted, albeit unsuccessfully, to restrict the public from the work area. Pet. App. 31a-32a. The Commission also rejected the ALJ's "plain view" rationale, on the ground that the compliance officer was in an area closed off to the public, and his observations were not inadvertent. *Id.* at 33a-34a.

The Commission held that the warrantless search was justified, however, by the "open fields" doctrine, which holds that, outside of the curtilage surrounding a home, there is no cognizable privacy interest in, and thus no Fourth Amendment protection for, outdoor activities. *Id.* at 35a. In the Commission's view, the worksite in this case constituted an "open field" because, while the site was separated from traffic by widely spaced barrels, passing motorists had an unimpeded view of the construction activities. *Id.* at 35a-37a & n.15. As to the second phase of the inspection, the Commission held that the administrative search warrant had been validly issued based on (i) the specific evidence of existing violations, (ii) the consent of the state and federal agencies responsible for the highway project, and (iii) the neutral inspection guidelines set forth in OSHA's general administrative plan. *Id.* at 48a-56a.[1]

4. The court of appeals affirmed. Pet. App. 3a. The court found no need to determine—and therefore did not address—whether the construction site was subject to search under the "open fields" doctrine. *Id.* at 7a. The court relied instead on a provision in the prime construction contract (which was specifically incorporated by reference into petitioners' subcontracts) that authorized inspection of the worksite by state officials and by "the appropriate federal agency." In the court's view, "the contractual right of entry that Petitioners and the general contractor afforded 'appropriate federal

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[1] After addressing the permissibility of the inspections, the Commission vacated one citation on the merits. Pet. App. 67a-72a. Petitioners did not contest the merits of the remaining citations in the court of appeals, and in their petition for certiorari they challenge only the validity of the inspections under the Fourth Amendment.

inspectors' and the State of Ohio [was] incompatible with any expectation of privacy that Petitioners may have manifested in the open areas." *Id.* at 8a. In response to petitioners' contention that OSHA was not the "appropriate federal agency" within the meaning of the contract, the court reasoned that so long as any federal agency had the right to inspect the worksite, petitioners could have no reasonable subjective expectation of privacy in the area. *Ibid.* In any event, the court affirmed the Commission's finding "that OSHA was the appropriate federal agency to enforce safety and health standards at the construction site." *Ibid.*

Turning next to the warrant-authorized search, the court held that, despite OSHA's contractual right to inspection, petitioners retained a legitimate expectation of privacy in those areas of the project that were not in plain view and over which they exercised exclusive dominion. Pet. App. 9a. The court reasoned, therefore, that the propriety of the warrant turned on whether OSHA had demonstrated either "specific evidence of an existing violation" or "reasonable * * * administrative standards for conducting an * * * inspection." *Ibid.* (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320 (1978)). The court determined that OSHA had made the requisite showing, because OSHA's then-effective administrative plan expressly authorized the expansion of a limited Section 8(f)(1) inspection to the entire workplace if, as here, "in the course of investigating [an initial complaint], OSHA observed multiple, potentially serious safety violations beyond those mentioned in the Complaint." Pet. App. 10a.

Judge Williams, who concurred in the result, rejected the majority's contractual rationale for the initial inspection because, in his view, OSHA was not the "appropriate federal agency" within the meaning of the

contract, and nothing in the contract manifested "a blanket abandonment of expectations of privacy" against inspections by agencies other than those specifically contemplated by the parties. Pet. App. 12a-13a. Judge Williams was convinced that no warrant was required, however, because the inspection occurred "in an area that anyone driving through Cincinnati could at will peer into—and *through*." *Id.* at 12a. To Judge Williams, "the completely open character of the area involved, fully exposed to the view of the thousands of motorists who passed by the site," was determinative. *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 8-14) that the Court should grant review to resolve what petitioners regard as a conflict between the protection afforded businesses by the Fourth Amendment's prohibition against warrantless and unreasonable searches and the "open fields" doctrine, under which persons have no constitutionally recognized privacy interest in activities conducted outdoors, beyond the curtilage of a home. There is no such conflict,[2] but even if there were, that

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[2] Contrary to petitioners' assertions, there is neither "conflict" (Pet. 9) nor "tension" (Pet. 13) between the Fourth Amendment protection that is afforded legitimate business operations and the "open fields" doctrine. The "open fields" doctrine "may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields." *Oliver* v. *United States*, 466 U.S. 170, 178 (1984). The doctrine "is true to the conception of the right to privacy embodied in the Fourth Amendment," *ibid.*, and it "accords with the 'reasonable expectation of privacy' analysis developed in [the] decisions of this Court." *Id.* at 184; see also Pet. App. 12a (Williams, J., concurring in the result) ("[T]he 'open fields' doctrine * * * is simply a special case of the more general doctrine that a reasonable expectation of privacy is necessary for a successful 4th Amendment

issue is not presented here, because the court of appeals did not base its decision in this case on the "open fields" doctrine. See Pet. App. 7a ("[W]e need not reach the * * * question of whether Petitioners' construction site falls within the Fourth Amendment's 'open fields' exception."). Instead, the court held the search permissible because the provision in the prime contract that allowed for inspections by state officials and the "appropriate federal agency" put petitioners "on notice that 'appropriate' federal inspectors could enter the construction site without further consent from Petitioners," and petitioners could not therefore establish any reasonable expectation of privacy in the open areas of the project. *Id.* at 7a-8a.

2. Petitioners argue in passing (Pet. 10 n.2) that the court of appeals was wrong to rely on the contract. Petitioners do not assert that the court's resolution of that fact-bound issue conflicts with any decision of this Court or of any other court of appeals. Moreover, their challenge to the court's decision on that issue is without merit.

Petitioners contend (Pet. 10 n.2) that the Commission's factual finding that OSHA was "trespassing on the work area" was tantamount to a holding that OSHA did not have a contractual right to inspect the site. The Commission's "trespassing" finding was made, however, in the context of its rejection of the "plain view"

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claim."). As this Court has made clear, the doctrine is not limited to the conduct of criminal activities, but extends broadly and takes in legitimate activities, such as "the cultivation of crops, that occur in open fields." *Oliver*, 466 U.S. at 179. Just as it extends to the business of farming, it extends equally to the business of highway construction. See *id.* at 180 n.11. ("An open field need be neither 'open' nor a 'field' as those terms are used in common speech.").

rationale for upholding the warrantless phase of the inspection. See Pet. App. 34a. When the Commission addressed whether petitioners were contractually obligated to permit workplace inspections by appropriate federal agencies, it expressly ruled that OSHA's inspection was "[i]n all likelihood * * * precisely the kind of inspection that was anticipated when this contractual provision [to comply with pertinent federal laws, rules, and regulations, and to submit to inspection by the appropriate federal agency] was drafted and included in the governing contracts." *Id.* at 51a. Moreover, the primary basis for the appellate court's decision was not contractual consent *per se*, but the objective unreasonableness of petitioners' asserted expectation of privacy in light of the contractual provisions granting a right of inspection to government entities. Cf. *Donovan* v. *A.A. Beiro Constr. Co.*, 746 F.2d 894, 900 (D.C. Cir. 1984) ("The contract provisions are relevant only to the extent they bear upon [the company's] legitimate expectations of privacy.").

3. Petitioners argue (Pet. 14) that the second-stage, full-scope inspection violated their Fourth Amendment rights because the information that supported OSHA's warrant was unlawfully obtained during the initial warrantless inspection. Petitioners assert, consequently, that this case presents the Court with an opportunity to determine whether improperly obtained information invalidates an administrative inspection warrant, Pet. 15-16, and whether the exclusionary rule applies to OSHA proceedings, *id.* at 16-18. Those issues are not presented in this case. Because the court below correctly determined that the initial inspection did not violate petitioners' Fourth Amendment rights, it had no

occasion to address the effects of a Fourth Amendment violation.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioners do not contend that probable cause to support the warrant was lacking if (as the court below held , see Pet. App. 10a) information obtained during the initial inspection was properly considered. See Pet. i, 14-16.